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# The Value of Communication Practices for Comparative Law: Exploring the Relationship between Scotland and England

Alexandra Braun\*

**Abstract:** This article explores the relationship between the Scottish and the English legal traditions through the lens of communication practices. ‘Communication practices’ are conceived of as the multiple ways in which legal traditions interact with one another by a combination of the circulation of legal ideas and the activities of legal actors. The article argues that greater attention should be paid in comparative legal literature to communication practices as they evolve over time and space, being especially mindful of the language used and the labels employed. By exploring different shapes of temporality and space, this article demonstrates the importance of looking beyond both discrete events and moments of transplantation, and the immediate geographical space. It also shows that the focus on language and what is explicitly said, but also on what is not said, generates insights both into the various techniques and practices involved in communication, as well as the factors that play a role. By examining concrete examples of communication involving both judges and legislatures, drawn from across different areas of law and different time periods, this article argues that contrary to the prevailing narrative, communication practices between Scotland and England are much richer and more dynamic than we tend to assume. Ultimately, the article questions the narrative and construction of the Scottish legal tradition, and of mixed legal systems more generally, as systems that primarily adopt ideas from abroad, rather than generating ideas capable of stimulating and shaping developments elsewhere.

## 1. Introduction: Challenging Prevailing Perspectives and Narratives

Comparative lawyers have long been fascinated with the study of how legal ideas circulate across jurisdictions and legal traditions.<sup>1</sup> As is well known, in some cases, this circulation has led to the creation of ‘mixed legal systems’,<sup>2</sup> which include Scotland, for it displays a mixture between Civil law and English common law. Mixed legal systems therefore offer a fertile ground of investigation in this field and have attracted increasing attention in recent years.<sup>3</sup> However, it would appear that the use of the label ‘mixed legal system’ has led legal scholars

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\* Lord President Reid Professor of Law, University of Edinburgh. I would like to thank Ross Anderson, John Blackie, John Cairns, George Gretton, Alasdair Peterson, Elspeth Reid, Kenneth Reid, Ruth Sefton-Green, and Neil Walker for their helpful suggestions and comments. I would also like to thank those who attended the lecture for their stimulating questions and comments and, in particular, Lord Mance for chairing the lecture.

<sup>1</sup> It was a Scottish legal scholar, the late Alan Watson, who singled out the theme as a major subject for comparative legal studies. See A Watson, *Legal Transplants: An Approach to Comparative Law* (1974). For an overview of the debate and literature in the field, see especially M Graziadei, ‘Comparative Law as the Study of Transplants and Receptions’, in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2<sup>nd</sup> edn, OUP 2019) 443.

<sup>2</sup> The literature on the topic is rich. For an overview of the various conflicting views on the meaning of ‘mixed legal systems’ and on what counts as such see, especially, J du Plessis, ‘Comparative Law and the Study of Mixed Legal Systems’ in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2<sup>nd</sup> edn, OUP 2019) 474; VV Palmer, ‘Mixed Legal Systems’ in M Bussani and U Mattei (eds), *The Cambridge Companion to Comparative Law* (CUP 2012) 368; E Öricü, ‘Mixed and Mixing Systems: A Conceptual Search’, in E Öricü, E Attwooll and S Coyle (eds), *Studies in Legal Systems: Mixed and Mixing* (Kluwer Law International 1996) 333.

<sup>3</sup> KGC Reid, ‘The Idea of Mixed Legal Systems’ (2003) 78 *Tulane Law Review* 5, 16.

to direct their attention primarily to the origins of the law in such systems. In other words, the emphasis in comparative legal literature has often been placed on what mixed legal systems have ‘imported’ from other legal traditions.<sup>4</sup> This, I argue, has obscured other important features of mixed legal systems and, especially, their relationship with other legal traditions.

As far as Scotland in particular is concerned, it is noticeable that much of the scholarly debate has centred on whether it has created an optimal mix<sup>5</sup> by picking the best solutions available in other jurisdictions, or whether the fact that Scotland has taken ideas from other jurisdictions is actually a sign of weakness.<sup>6</sup> Either way, the prevailing narrative in the literature has been one in which Scots law and its legal actors, rather than generating ideas that circulate abroad, have taken ideas and inspiration from, or have been subjected to the influence of, other legal traditions. Whilst there are numerous studies that have explored the reception of Roman and Civil law in Scotland,<sup>7</sup> and especially English law,<sup>8</sup> comparatively little appears to have been written about the extent to which Scots law has shaped developments elsewhere,<sup>9</sup> including south of the border. Even though some authors have pointed to institutional factors that have allowed Scots law to influence developments in England, such as the

<sup>4</sup> See JW Cairns, ‘National, Transnational and European Legal Histories: Problems and Paradigms. A Scottish Perspective’ (2012) 5 *Clio@Thémis: Revue électronique d’histoire du droit* 1, 12-13.

<sup>5</sup> Lord Cooper, ‘The Scottish Legal Tradition’ reported in the Scottish Legal Tradition, The Saltire Society and the Stair Society (1991) 65, 68 and TB Smith in the works cited below at Fn 8. The debate is referred to by WA Wilson, ‘Knowing the Law and Other Things’ [1982] *Juridical Review* 259, 271. The notion of the genius of Scots law is however contested by R Evans-Jones, ‘Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law’ (1998) 114 *Law Quarterly Review* 228 ff; R Evans-Jones, ‘Mixed Legal Systems, Scotland and the Unification of Private Law in Europe’, in JM Smits (ed), *The Contribution of Mixed Legal Systems to European Private Law* (Intersentia 2001) 39, 44. A Rodger, ‘Thinking about Scots Law’ (1996) *Edinburgh Law Review* 1, 3; L Farmer, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law 1747 to the Present* (Cambridge 1997); L Farmer, ‘Debatable Land: An Essay on the Relationship between English and Scottish Criminal Law’ (1999) *Edinburgh Law Review* 32, 33; L Farmer, ‘The Genius of Our Law...’: Criminal Law and the Scottish Legal Tradition’ (1992) 55 *Modern Law Review* 25 ff; JM Thomson, ‘Legal change and Scots private law’, in JW Cairns and O Robinson (eds), *Critical Studies in Ancient Law. Comparative Law and Legal History: Essays in Honour of Alan Watson* (Oxford 2001) 379. On possible meanings of the word ‘genius’, see HL MacQueen, ‘Scots and English Law: The Case of Contract’ (2001) *Current Legal Problems* 205, 212.

<sup>6</sup> See especially Evans-Jones, ‘Receptions of Law’ (n 5) 228 ff.

<sup>7</sup> See, for example, P Stein, *Roman Law in Scotland* (1968); WM Gordon, ‘The Civil Law in Scotland’ (2010) *Edinburgh Law Review* 130; JW Cairns, ‘Historical Introduction’ in KGC Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vol 1 (OUP 2000) 14.

<sup>8</sup> Some authors have therefore spoken of an ‘Anglicisation’ of Scots law especially in the 18<sup>th</sup> and 19<sup>th</sup> centuries. TB Smith ‘English Influences on the Law of Scotland’ (1954) 3 *American Journal of Comparative Law* 522, 540; TB Smith ‘The Common Law Cuckoo’ (1956) *Butterworths South African Law Review* 147; TB Smith, *British Justice: The Scottish Contribution* (London 1961) 85. See also AD Gibb, *Law from over the Border. A short Account of a Strange Jurisdiction* (1950); AD Gibb, ‘The inter-relation of the legal systems of Scotland and England’ (1937) 53 *Law Quarterly Review* 61; GC Hutchison, ‘Anglo-Scottish Political Relations in the Nineteenth Century, c. 1815-1914’ in Smout (ed), *Anglo-Scottish Relations from 1603-1900* (OUP 2005) 247, 252-3. The term is also employed by PH Brodie, ‘From Scotland and Ireland. (a) Scotland after 1704’ in L Blom-Cooper, B Dickson and G Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford 2009) 279, 289-294 and by A Paterson, *Final Judgment. The Last Law Lords and the Supreme Court* (Hart Publishing 2013) 225.

<sup>9</sup> Exceptions are authors cited in fnn (n 12-13) below as well as Lord Denning, *Borrowing from Scotland*, 26th David Murray Lecture (Glasgow 1963); Lady Hale, ‘The Contribution of Scottish Cases to Developing United Kingdom Law’, Law Society of Scotland Annual Conference 2018. Some scholars have examined the influence of Scottish legal ideas in the US: RH Helmholz, ‘Scots Law in the New World: Its Place in the Formative Era of American Law’ in HL MacQueen (ed), *Stair Miscellany V* (Stair Society vol 52, 2006) 169 who reaches rather different conclusions from CP Rogers, ‘Scots Law in Post-Revolutionary and Nineteenth-Century America: The Neglected Jurisprudence’ (1990) 8 *Law & History Review* 205. See further W Ewald, ‘James Wilson and the Scottish Enlightenment’ (2010) 12 *Journal of Constitutional Law* 1053, 1106 ff; JE Pfander and DD Birk, ‘Article III and the Scottish Judiciary’ (2011) 124 *Harvard Law Review* 1613; A Rahmatian, *Lord Kames: Legal and Social Theorist* (EUP 2016) ch XI.

disproportionately high number of Scottish appeals to the House of Lords between 1740 and 1875,<sup>10</sup> and the convention, established later, of there being two Scots among the Lords of Appeal in Ordinary,<sup>11</sup> they do not usually engage in a case study. Only a few scholars have investigated examples where Scottish legal ideas have circulated south of the border,<sup>12</sup> including cases where Scots law has operated as a channel for Roman or natural law ideas.<sup>13</sup> As a consequence, the relationship between Scotland and England has been explored mostly from one particular angle, namely the extent to which, and the ways in which, English law has influenced, or encroached upon, Scots law.<sup>14</sup>

The purpose of this article is to offer a different perspective on the relationship between Scotland and England. More specifically, its aim is to explore various dimensions of this relationship through the lens of communication practices.<sup>15</sup> By ‘communication practices’ I mean the multiple ways in which legal traditions interact with one another by a combination of the circulation of legal ideas and the activities of legal actors.<sup>16</sup> The paper seeks to apply the concept of communication practices to the relationship between the Scottish and the English legal traditions, but also to reflect on what comparative law can learn from this particular exercise, including for the study of how legal ideas circulate as well as for its approach to mixed legal systems more generally.

The article argues that contrary to the prevailing narrative, communication practices between Scotland and England are much richer and more dynamic than we tend to assume. This is so in areas and ways that are not necessarily always apparent, and in which a multitude of players both north and south of the border play a role. The article further claims that in order to appreciate the dimensions and dynamics of communication practices, as well as the quality of the multiple layers of interaction between legal traditions, it is important to look beyond

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<sup>10</sup> In the early 19<sup>th</sup> century the number of appeals reached 80% and then dropped to 10% at the end of the 19<sup>th</sup> century. On the number of appeals, see Paterson, *Final Judgment* (n 8) 232-234; L Blom-Cooper and G Drewry, *Final Appeal* (Clarendon 1972) 31 ff; J Finlay, ‘Scots lawyers and the House of Lords Appeals in Eighteenth-Century Britain’ (2011) 32 *Legal History* 249, and, more recently, P Loft, ‘Litigation, the Anglo-Scottish Union, and the House of Lords as the High Court, 1660-1875’ (2017) *The Historical Journal* 1.

<sup>11</sup> The Convention has been in place since 1932 and has carried on with the Supreme Court even though the Constitutional Reform Act 2005 only requires that there should be at least one Justice with knowledge and experience of the law and practice in each part of the United Kingdom. Alan Paterson has pointed out that influence did not come merely from numbers but also the length of service of Scottish judges: A Paterson, ‘Scottish Lords of Appeal, 1876-1988’ [1988] *Juridical Review* 235, 250. In addition, Scotsmen had an influence in their position as Lord Chancellors, who often did the judicial work of the HL, and as members of the Privy Council.

<sup>12</sup> For detailed studies see JA Dieckmann, ‘Scots Influence on English Law: The Guarantor’s Right to Derivative Recourse (Subrogation)’ (2004) 8 *Edinburgh Law Review* 329; Evans-Jones, ‘Receptions of Law’ (n 5); R Evans-Jones, ‘Roman law in Scotland and England and the development of one law for Britain’ (1999) 115 *Law Quarterly Review* 605.

<sup>13</sup> D Ibbetson, ‘Common Law Evolution: The Influence of Mixed Legal Systems’, in HL MacQueen (ed), *Stair Miscellany VI* (The Stair Society vol 54, 2009) 267, 276.

<sup>14</sup> To the point that some have even spoken of a ‘Scottification’ especially at certain times in history, Paterson, ‘Scottish Lords of Appeal’ (n 11) 246; Paterson, *Final Judgment* (n 8) 231. See also Lady Hale, ‘The Contribution of Scottish Cases’ (n 9) 7.

<sup>15</sup> That law can be studied as communication is not a new suggestion. See especially M van Hoecke, *Law as Communication* (Hart Publishing, 2002) and D Nelken (ed), *Law as Communication. Issues in Law & Society* (Dartmouth Publishing Co Ltd 1996).

<sup>16</sup> In my previous work I have focused on the communication between academics and judges. See A Braun, ‘Judges and Academics: Features of a Partnership’ in J Lee (ed), *From House of Lords to Supreme Court. Judges, Jurists and the Process of Judging* (Hart Publishing 2010) 227 and *Giudici e Accademia nell’esperienza inglese. Storia di un dialogo* (Mulino 2006). That the circulation of ideas depends on people is stressed by J Bell, ‘The Relevance of Foreign Examples to Legal Development’ (2001) 21 *Duke Journal of Comparative & International Law* 431, 443.

both discrete events,<sup>17</sup> and the immediate geographical space. Indeed, it is submitted that greater attention should be paid in comparative legal literature to communication practices as they evolve both over time and space.<sup>18</sup> We can then appreciate that circulation takes different forms and shapes, often involving a number of successive events that are interconnected, and that legal change is a subtle interactive phenomenon.

It is further submitted that, when investigating communication practices, we should be especially mindful of the language employed, whilst also being prepared to look beyond it. This, I argue, will allow us to obtain insight not only into the various techniques and practices involved in communication, but also the role and relevance (or not) of certain causal factors, i.e. factors that drive or facilitate circulation. We can then also see what is specific to the relationship between Scotland and England.

I should premise that my analysis will not engage with the question of which influence is greater, the English or the Scottish, or of whether such influence is even desirable. Indeed, I should mention from the outset that I do not approach this subject in any narrowly nationalistic spirit. Further, this is not a study concerning convergences or divergences between English and Scots law. Rather, this article is intended to shed light on aspects of the relationship between Scots and English law hitherto often neglected and to articulate the significance of these aspects for the comparative study of law more generally.

The article explores a selective set of concrete examples of circulation<sup>19</sup> of Scottish legal ideas. I take the term ‘legal ideas’ to include rules and legal doctrines but also legal reasoning, coming from Scotland. Some of the examples are recent and others more remote and are drawn from a range of different areas of the law. Although communication can occur in different ways, including through legal education, legal scholarship, and law reform bodies,<sup>20</sup> in this article, I will focus primarily on judicial or legislative processes.

The article is divided into two parts that explore two vital dimensions of communication practices. The first part deals with the spatio-temporal dimension, where I examine various shapes of temporality and explore the added value of paying attention to the spatial dimension. The second part looks at the language employed by judges, and what it reveals about what they are doing but also what they say they are doing, and thus the techniques they can resort to, thereby exposing also the manifest and hidden dimension of the circulation.

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<sup>17</sup> Here see also W Twining, ‘Diffusion of Law: A Global Perspective’ (2004) 36 *The Journal of Legal Pluralism and Unofficial Law* 1, 34.

<sup>18</sup> On this point, see also M Cohn ‘Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom’ (2010) 58 *The American Journal of Comparative Law* 583, 597.

<sup>19</sup> In this article, I deliberately make use of the term ‘circulation’ rather than other terms that have dominated the comparative legal discourse, such as ‘legal transplants’, ‘legal transfers’, ‘legal transposition’, ‘diffusion’ or ‘legal borrowing’. Circulation is, in my view, a much more dynamic concept, that suggests and reflects the constant flow of ideas in all directions. Circulation is capable of capturing a wide range of communicative practices, including cases where the ideas move both ways or come full circle, whilst avoiding any assumptions about the reasons that lie behind such circulation, or about who has initiated it. It is further helpful because it does not suggest that the idea sticks. For a discussion of the meaning of ‘circulation’, see S Gänger, ‘Circulation: reflections on circularity, entity, and liquidity in the language of global history’ (2017) *Journal of Global History* 303. On the terminology in this context, see further Graziadei (n 1) as well as D Nelken, ‘Comparatists and transferability’, in P Legrand and R Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (CUP 2003) 437, 463-4.

<sup>20</sup> For examples of projects of the Law Commission of England and Wales that have adopted solutions found in Scots law, see S Wilson Stark, *The Work of the British Law Commissions: Law Reform... Now?* (Hart Publishing 2017) 224 ff.

## 2. *Paying Attention to the Spatio-Temporal Dimensions of Communication Practices*

### A. *Exploring Communication Practices over Time*

The first dimension of communication practices I would like to explore is the temporal one. What I am trying to show is that to obtain a better understanding of the relationship between legal traditions, in our case Scotland and England, we should study communication practices as they unfold across time, sometimes long stretches of time. This might enable us to see, for instance, the varying degrees of influence of one tradition over another. But this is not my focus. Rather, in this paper, I argue that the temporal aspect allows us to also see that the circulation is frequently sequential and incremental, and that the adoption is often phased or deferred. In other words, more than one event is often required before an idea can gain a foothold. We should not therefore limit our attention solely to the moment at which the idea is either adopted or rejected. Also, one event may lead to another. Thus, the communication is an ongoing one that often involves various steps, which may, but do not have to, accumulate in an incremental way, or lead to further circulations. This is not just the case where a legal idea is embraced by the courts, but also when legislatures are involved.<sup>21</sup>

A good example of where the circulation was sequential and the adoption deferred, in this case because there was resistance at first, is the doctrine of *forum non conveniens*.<sup>22</sup> I will only mention it very briefly, as it is commonly acknowledged that the doctrine emerged in Scots law and later circulated south of the border and then beyond. Indeed, it has been described as ‘Scotland’s most significant legal export in the field of private international law, influencing the development of similar doctrines across the common law world.’<sup>23</sup> However, what is critical here is that this did not happen from one day to the other. It required three appeals (none of which were Scottish) to the House of Lords across a period of thirteen years, beginning in 1974,<sup>24</sup> and ending in 1987,<sup>25</sup> before the doctrine was adopted in England. As Lord Bingham has pointed out:

Eventually, as we know—in no small part due to the work of Lord Goff, both as advocate and judge, and the wisdom of Lord Diplock—the Scottish rule was adopted in England. But it took three appeals to the House of Lords to put the law where, one feels, it should always have been and might have been had English lawyers of the time been willing to look north of the border and acknowledge that acceptance of jurisdiction by the English court is not necessarily an unmixed blessing for all concerned.<sup>26</sup>

By looking not only at the 1987 House of Lords decision in *Spiliada Maritime*, but also at prior case law, we gain a clearer picture of who played a role in the process but also of how and why the adoption was delayed. In fact, the decision to embrace the Scottish doctrine is

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<sup>21</sup> Another good example is the Scottish Bankruptcy legislation which influenced legislation south of the border at different stages. For details, see VM Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth-Century England* (OUP, 1995) 11 and especially 149 ff.

<sup>22</sup> The history of the doctrine is relayed in AE Anton, *Private International Law* (SULI 1967) 148-154.

<sup>23</sup> A Arzandeh, ‘The origins of the Scottish *forum non conveniens*’ (2017) 13 *Journal of Private International Law* 130, 131.

<sup>24</sup> In *The Atlantic Star*, *Atlantic Star (Owners) Appellants v Bona Spes (Owner) Respondent* [1974] AC 436 (HL) the House of Lords were invited to abandon the doctrine that proceedings in England could only be taken in another country if the former were oppressive. Ten years later, in *The Abidin Daver* [1984] AC 398, 411 (HL) the House of Lords moved some way towards the acceptance of the Scottish doctrine.

<sup>25</sup> *Spiliada Maritime Corporations v Cansulex Ltd* [1987] AC 460 (HL).

<sup>26</sup> TH Bingham, ‘“There Is a World Elsewhere”: The Changing Perspectives of English Law’ (1992) 41 *The International and Comparative Law Quarterly* 513, 517.

likely to have been possible only because of the previous appeals, which were in a sense preparatory, and thus part of the same process.

Another fascinating, though less well known, example of an instance in which the circulation of ideas from Scotland was sequential, and the adoption phased, is the area of declaratory orders.<sup>27</sup> One circulation was followed by another, with the first one inviting or at least facilitating the next one.<sup>28</sup> As is well known, declaratory orders count as preventive reliefs the purpose of which is to afford security and relief against uncertainty or doubt. Although the historic roots of the Scottish declarator seem to lie in 14<sup>th</sup> and 15<sup>th</sup> century French law,<sup>29</sup> there is no doubt that Scots law provided the model for legislation south of the border.<sup>30</sup> But the Scottish influence did not stop there. It is thus useful to distinguish two stages, each involving various steps and events, and over a prolonged period of time. The first one began in 1828<sup>31</sup> when Lord Brougham started advocating in support of the introduction of the Scottish declaratory action in England. The second stage commenced with Lord Dunedin's seminal judgment in an English appeal to the House of Lords, decided in 1921.<sup>32</sup>

Let me start from the beginning. Others have shown that although various Lord Chancellors including Lord Thurlow, Lord Loughborough and Lord Eldon, had supported the legal change, England owes the 'declaratory action to the agitation of Lord Brougham.'<sup>33</sup> In particular, from 1843 onwards, Lord Brougham, who as is well known had studied law at Edinburgh and who had begun his professional life as a Scottish advocate, had introduced a series of bills that were modelled on the Scottish declarator action. The process went through various stages, including the passing of the Chancery Act 1850, an amendment to the Chancery Procedure Act of 1852, and the introduction of the Legitimacy Declaration Act 1858, ultimately resulting in the 1883 Rules of the Supreme Court. The rules gave English courts a general power to give declaratory judgments, but they were enacted at a time when Lord Brougham had already passed away.<sup>34</sup> In other words, it took 40 years from the first bill, and more than one attempt, before declaratory actions were fully available in England.

But the circulation of Scottish legal ideas in this area of the law did not stop there. The second stage at which ideas entered south of the border commenced with the House of Lords decision in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade*, dating back to 1921.<sup>35</sup> Two questions were raised in *Russian Commercial*, but only one concerns us here, namely, how the court should exercise any jurisdiction to give a declaratory order granted

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<sup>27</sup> Another good example is the law of guarantees. Here see Dieckmann (n 12), who shows that Scottish legal ideas were drawn upon at two different stages in the 19<sup>th</sup> century: at first, through the silent borrowing of Lord Kames' ideas through case law, and then through a legislative intervention, in this case through the Mercantile Law Amendment Act 1856, section 5, that was manifestly and openly aimed at assimilating the law on both sides of the border.

<sup>28</sup> Cohn (n 18) 598 has argued that legal transplants are not 'solitary events'.

<sup>29</sup> See EM Borchard, 'The Declaratory Judgment-A Needed Procedural Reform' (1918) 28 Yale Law Journal 1, 16. See also his book *Declaratory Judgments* (2<sup>nd</sup> edn, 1941). What is interesting is that by the time it entered Scotland, the action had fallen into disuse in France.

<sup>30</sup> That Scots law had such an action in place was widely known south of the border. See *Curtis v Sheffield* (1882) 21 Ch D 1, 4, per Jessel MR.

<sup>31</sup> On 7 February 1828 Lord Brougham gave his famous speech on the 'State of the Courts of Common Law' to the House of Commons, in which he praised the Scotch declarator. HC Deb, 7 February 1828, vol 18, cols 127, 179. On Lord Brougham's influence see, especially, RS, 'The Scotch Action of Declarator' (1849) *The Law Magazine* 173.

<sup>32</sup> *Russian Commercial and Industrial Bank v British Bank for Foreign Trade* [1921] 2 AC 438 (HL).

<sup>33</sup> Borchard (n 29) 25. See Lord Brougham in *Earl of Mansfield v Stewart* (1846) 5 Bell 139, 160.

<sup>34</sup> For more details about the historical developments, see Borchard (n 29) 25-28; ER Sunderland, 'A Modern Evolution in Remedial Rights – the Declaratory Judgment' (1907) 16 Michigan Law Review 69, and Lord Woolf and J Woolf, *The Declaratory Judgment* (Sweet & Maxwell 2011) chapter 2.

<sup>35</sup> *Russian Commercial and Industrial Bank v British Bank for Foreign Trade* (n 32).

under the 1883 Rules. Again, the answer came from north of the border, though it was not immediately adopted.

*Russian Commercial* was an English case and the only Scottish judge involved was Lord Dunedin,<sup>36</sup> who was also the only one referring to Scots law. What is more, he seems to have referred to Scots law of his own accord, without counsel of either party mentioning it. In deciding whether the High Court Chancery Division can grant a declaratory order, Lord Dunedin discussed the general principles of Scots law and suggested that these principles are instructive for English lawyers. Quoting his Lordship:

My Lords, I confess that to my mind such expressions give little guidance. It may be that I am swayed by my experience of another system of law, but a rule which can be expressed in the form of a principle may well be proper to any legal system. Your Lordships are aware that the action of declarator has existed for hundreds of years in Scotland. It was praised, with envy, by Lord Brougham, in your Lordships' House, in the case of *Earl of Mansfield v. Stewart* long before the genesis of Order XXV. r. 5. The rules that have been elucidated by a long course of decisions in the Scottish Courts may be summarized thus: The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.<sup>37</sup>

It is noteworthy that (one exception aside), Lord Dunedin did not cite the long line of Scottish cases he was alluding to in the quote, but simply referred to general principles which he drew from Scots law. More significantly, a little later, his Lordship added:

I can scarcely lay down myself in this House rules for exercise of discretion by the English Courts when such discretion has not hitherto been administered so far as I can see by any rules. I can only hope that my remarks will be taken as obiter dicta and that when the occasion next arises they will be considered on their merits.<sup>38</sup>

The passage shows clearly that Lord Dunedin hoped that his remarks on Scots law would be taken up in future English cases. In other words, what his Lordship was doing is purposefully planting a seed,<sup>39</sup> and arguably he did so quite successfully. Indeed, Lord Dunedin's *obiter dictum* became influential in setting out that a declaratory action is only appropriate if a proper contradictor is in place, exercising considerable impact in all kinds of contexts.

Although Scots law was not determinative of the conclusion reached by the House of Lords in *Russian Commercial*, Lord Dunedin's proposed tests were picked up 36 years later, in *Vine Appellant v National Dock Labour Board* in 1957.<sup>40</sup> *Russian Commercial* was cited by counsel for the appellant but only for the purpose of arguing that declarations should be granted cautiously and sparingly.<sup>41</sup> Viscount Kilmuir LC, the only judge referring to *Russian Commercial*, first mentioned and agreed with Lord Finlay's dissenting opinion, whereby the

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<sup>36</sup> Lord Dunedin was appointed to the House of Lords in 1913 (and served until 1932), after having been President of the Court of Session for eight years. R Stevens, *Law and Politics. The House of Lords as a Judicial Body, 1800-1976* (Weidenfeld and Nicolson 1979) 269 describes Lord Dunedin as being 'Not above improving English law by importing Scottish concepts', citing *Ward v Van der Loeff* [1924] AC 653, 669 as an example. Paterson, 'Scottish Lords of Appeal' (n 11) 246 also commented that Lord Dunedin was among those Scots who 'stand out as tireless protectors of their indigenous law from conscious or unconscious assimilation with English Law'.

<sup>37</sup> *Russian Commercial and Industrial Bank v British Bank for Foreign Trade* (n 32), 448-449.

<sup>38</sup> *Ibid*, 450.

<sup>39</sup> Notice that in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade* (n 32) 448, Lord Dunedin refers to the passage by Lord Brougham from *Earl of Mansfield* mentioned above at Fn 33.

<sup>40</sup> *Vine Appellant v National Dock Labour Board* [1957] AC 488 (HL).

<sup>41</sup> *Ibid*, 497.



discretion should not be exercised save for good reason. Viscount Kilmuir LC further referred to what he called the ‘Scottish tests’ set out by Lord Dunedin which he found useful and which he reproduced in his judgment.<sup>42</sup>

Another 33 years later, in the House of Lords decision in *In Re F*,<sup>43</sup> in an English appeal, we encounter a similar (indirect) reference to Lord Dunedin’s tests, this time by Lord Goff (who had played a crucial role in the context of *forum non conveniens*)<sup>44</sup> who mentioned both, *Russian Commercial* and *Vine Appellant*, noting *obiter* that in the latter decision

Viscount Kilmuir L.C. found this Scottish approach to be helpful; and indeed there is authority in the English cases that a declaration will not be granted where the question under consideration is not a real question, nor where the person seeking the declaration has no real interest in it, nor where the declaration is sought without proper argument...<sup>45</sup>

Importantly, in this passage Lord Goff suggests that there is English authority that is essentially in line with the Scottish approach, though he does not cite any of the cases. Nonetheless, by indicating that there is English authority he may well have prepared the ground for the first instance English decision in *Wyko Group Plc and Others v Cooper Roller Bearings Co Ltd*,<sup>46</sup> where Lord Dunedin’s tests were eventually applied. After having outlined legislation providing courts with the power to grant declaratory relief, Ferris J stated that:

This has been the rule since 1883, albeit that its wording has been altered from time to time. It has been commented upon in a number of authorities to some of which I find it desirable to refer. In *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade [1921] 2 A.C. 438* at page 448 Lord Dunedin summarised the Scottish rule as follows: The question must be a real and not a theoretical question: the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought. He proceeded to apply this rule to the case before the House, which was an English case.<sup>47</sup>

Ferris J then proceeded to ascertain whether the requirements set out by Dunedin were present in the case and concluded that the first and third of Lord Dunedin’s conditions were not satisfied, therefore dismissing the appeal. In other words, Ferris J regarded *Russian Commercial*, including Lord Dunedin’s tests, as authority for English law, even though he explicitly spoke of a ‘Scottish rule’. The parties also relied upon *Re F*, mentioned above, and Ferris J pointed out that ‘In that case Lord Goff, at page 82, referred with evident approval to the passage which I have cited from Lord Dunedin’s speech in the *Russian Bank* case’,<sup>48</sup> almost as if to justify his own decision to apply Lord Dunedin’s tests. Thus, at this point, Lord Dunedin’s tests became part of English law and were henceforth treated as authoritative and applied in later cases, including by the Court of Appeal.<sup>49</sup>

To summarise, declaratory actions represent an interesting example where the circulation of Scottish legal ideas was sequential, for they entered south of the border at successive stages,

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<sup>42</sup> Ibid, 500.

<sup>43</sup> *In Re F* [1990] 2 AC 1 (HL).

<sup>44</sup> See above at Fn 26 the quote by Lord Bingham.

<sup>45</sup> *In Re F* (n 43), 82.

<sup>46</sup> *Wyko Group Plc and Others v Cooper Roller Bearings Co Ltd* [1996] FSR 126.

<sup>47</sup> Ibid, 132.

<sup>48</sup> Ibid, 133-134.

<sup>49</sup> *Point Solutions Limited v Focus Business Solutions Limited and another* [2007] EWCA Civ 14 [19]. The court rejected the appeal against *Point Solutions Limited v Focus Business Solutions Limited, Focus Solutions Group Plc* [2005] EWHC 3096 (Ch) [67]-[68]. See further, *HM (Iraq) v Secretary of State for the Home Department* [2011] EWCA Civ 1536.

with each possibly facilitating or inviting the other. Furthermore, at both stages of the process, the adoption of the ideas was phased. While the introduction into English law of a general power to give declaratory judgments took about 40 years, Lord Dunedin's tests as to when to provide a declaratory order also took some 75 years before they were adopted in English law. Lord Dunedin's seed planted in 1921 needed time to grow. Thus, temporality matters for it allows us to see the continuity of communication as well as the interconnectedness of events across time and space. At the same time, declaratory actions are also a good example where both the legislature and the courts (including judicial figures on both sides of the border) have played a significant part and where, unlike in other cases we will come across later, the Scottish provenance of the legal idea was never hidden.

## *B. Exploring the Spatial Dimensions*

The temporal aspect aside, we should also pay close attention to the spatial dimension of communication practices.<sup>50</sup> There are, of course, different ways of conceptualising space, and to a certain extent, spatiality has always played a role in the scholarly debate involving legal transplants, the idea being that a legal idea is transplanted from one place to another. However, the point I would like to stress here is that it is essential not merely to examine the immediate geographical space/relationship between Scotland and England but to also pay attention to the broader spatial dimension. By doing so we are able to see facets of their relationship and the communication practices that are not always immediately obvious, though no less significant. We will, for instance, see that there are areas of the law where Scottish legal ideas have circulated south of the border not directly but via another jurisdiction, and thus indirectly.

### *(i) The communication takes place via another jurisdiction*

A good example of both a direct and, more importantly, indirect communication between the Scottish and the English legal traditions (in this case, via New Zealand), is the process that led to the introduction of the family provision legislation in England.<sup>51</sup> This legislation enables certain persons who have not been adequately provided for in a will or on intestacy, to bring a claim for reasonable financial provision from a deceased person's estate. The process that led to the introduction of the legislation in England involved various stages during which Scots law played a key role, at different times and in different geographical places, even though, technically speaking, the Scottish approach to testamentary freedom and family protection was never adopted in England.

First, together with other jurisdictions, Scots law and its system of fixed shares in the form of legal rights for the protection of the spouse and the children of the deceased,<sup>52</sup> presented an incentive for introducing changes into English law and thus for limiting testamentary freedom.<sup>53</sup> In addition, Scots law also offered a model which was directly drawn upon on several occasions during the English legislative process,<sup>54</sup> even though ultimately the New

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<sup>50</sup> A Kedar, 'Expanding Legal Geographies. A Call for a Critical Comparative Approach', in I Braverman, N Blomley, D Delaney and A Kedar (eds), *The Expanding Spaces of Law. A Timely Legal Geography* (Stanford University Press 2014) 95, who advocates for a greater attention to spatiality in comparative law.

<sup>51</sup> Now enshrined in the Inheritance (Provision for Family and Dependents) Act 1975.

<sup>52</sup> For a more detailed account, see KGC Reid, 'Legal Rights in Scotland', in KGC Reid, MJ de Waal, and R Zimmermann (eds), *Comparative Succession Law: Family Protection*, vol III (OUP 2020 forthcoming).

<sup>53</sup> J Finch, J Mason, J Masson, L Wallis and L Hayes, *Wills Inheritance and Families* (Clarendon Press 1996) 25.

<sup>54</sup> For an account of the history of the Inheritance (Family Provision) Act 1938, and the role of Scots law, see J Dainow, 'Limitations on Testamentary Freedom in England' (1940) 25 Cornell Law Review 337, 344 ff. For a

Zealand model, which provides courts with discretionary powers to provide for certain persons,<sup>55</sup> prevailed. However, as we will see, that model too had come into close contact with the Scottish approach to testamentary freedom and the protection of the interests of the family.

As Joseph Dainow has shown, at the start of the 20<sup>th</sup> century, it was clear in England that family members did not enjoy sufficient protection and that the deceased's testamentary freedom was conceived of as being too wide.<sup>56</sup> Nonetheless, twenty years had to pass before a Bill was first submitted to Parliament aimed at protecting certain family members from disinheritance, and another ten years before legislation was finally passed in 1938.<sup>57</sup> In 1928 Viscount Astor presented a motion to the House of Lords, and a first Bill. The clear impetus behind his 'Wills and Intestacies (Family Maintenance) Bill' was both a growing number of cases in which some family members went empty handed, but also an increasing awareness, it seems, that elsewhere, that is to say in Scotland, but also other parts of the Empire, things worked rather differently. What is more, the Astor Bill combined a fixed statutory share that was based on Scots law with the New Zealand model mentioned earlier. Although Viscount Astor's Bill would appear to have obtained wide newspaper publicity, and the general reaction was favourable,<sup>58</sup> it remained unsuccessful, and the same fate awaited Astor's second Bill.

Another Bill (the First Rathbone Bill) was presented in 1930 which also took inspiration from Scotland as well as New Zealand.<sup>59</sup> It proposed a priority payment and an income for the surviving spouse, as well as an income for the children that the court had the power to annul in certain circumstances.<sup>60</sup> At this stage, a Joint Select Committee of both Houses was appointed to investigate the support for, and opposition to, the Bill, but again the Bill was not passed, and several others had to follow. Meanwhile, however, a clear preference had emerged among the Committee members for the New Zealand system and this preference prevailed until the end. Thus, at this point, the Scottish model no longer featured in the debate,<sup>61</sup> except for the fact that when the final Bill was passed in 1938 'attempts were made to sidetrack this Bill by reiterating preference for a fixed statutory share on the Scottish lines.'<sup>62</sup>

Although, in the end, the Scottish approach to testamentary freedom and family protection did not prevail in England, Scots law provided both an incentive as well as a model for several Bills, clearly shaping the debate in this area. Additionally, and often less well known, the New Zealand model that prevailed in England had also come into close contact with Scottish legal ideas. In reconstructing the fascinating history of the New Zealand Testator's Family Maintenance Act 1900, Rosalind Atherton has shown that the initiative for the legislation in New Zealand, aimed primarily at limiting the husband's testamentary freedom, came from a Scottish immigrant couple, the Stouts: Lady Anna Paterson Stout, a leader of the women's movement, and her husband, Sir Robert Stout, first Premier and later Chief Justice of New

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detailed account of the various Bills, see R Oughton (ed), *Tyler's Family Provision* (3<sup>rd</sup> edn, Butterworths 1997) 3-19.

<sup>55</sup> Family Protection Act 1955.

<sup>56</sup> Dainow (n 54) 345.

<sup>57</sup> Inheritance (Family Provision) Act 1938.

<sup>58</sup> HL Deb 16 May 1928, vol 71, cols 38-61 where Lord Halden pointed out that the Scottish model was not without its problems: 'although in theory it gave to the children a share of their father's estate and provided for the wife by the *ius relictae*, in practice it was ineffective, for its operation was usually excluded by marriage settlements.' The debate in the House of Lords attracted attention in academic circles. See (1928) 44 Law Quarterly Review 281-3.

<sup>59</sup> Dainow (n 54) 347-8.

<sup>60</sup> Ibid, 348 for further detail as to how close the Bill followed the Scottish model.

<sup>61</sup> Ibid, 349.

<sup>62</sup> Ibid, 356.

Zealand.<sup>63</sup> More significantly, Sir Robert Stout<sup>64</sup> introduced two Bills in New Zealand, one in 1896,<sup>65</sup> and the other in 1897,<sup>66</sup> both of which were aimed at limiting ‘the power of disposition by will’<sup>67</sup> by granting the surviving spouse and children a fixed share, as was the case in Scots law.<sup>68</sup> However, both Bills met with opposition. In brief, when Stout resigned from Parliament in 1898, a further three Bills followed introduced by Robert McNab, but these looked rather different. Although the object of McNab’s Bills was the same, what they proposed was completely different, for they adopted a discretionary model rather than a model of fixed shares as in place in Scotland. As Atherton shows,<sup>69</sup> this model was specifically designed by McNab to answer objections made to the more intrusive Scottish model that had informed Stout’s earlier Bills. Although it is difficult to establish a clear causal link, Atherton illustrates that there are facts from which to infer possible connections between Robert McNab and Robert Stout,<sup>70</sup> including that both men had their legal backgrounds in Dunedin where the Scottish influence had been strong.

To summarise, although in the end both New Zealand and England ended up rejecting the Scottish approach to testamentary freedom, and English law followed the New Zealand model, Scots law provided the stimulus for legal change in England both directly and, crucially for the purposes of this section, also indirectly.<sup>71</sup> One could indeed argue that Stout’s initiative and his Bills, based on Scots law, paved the way – and provided an approach against which to react and develop a new model – for the legislation that was passed in New Zealand in 1900 and that would, as we saw, influence developments in England and elsewhere.

Thus, communication practices are often more complex than one might expect and in order to realise that, we need to look beyond the immediate geographical space. To add to the complexity, a recent study suggests that it may well be the case that ‘the immediate source of legitim and *jus relictæ* in Scotland lay in the English law of the twelfth and thirteenth centuries.’<sup>72</sup> In other words, in developing a system of fixed shares, Scots law is likely to have drawn on English sources. This confirms once more that the spatial dimension aside, investigating communication practices across time matters. It also shows that ideas have circulated in both directions and have sometimes even come full circle. This leads me to the next and last point concerning the spatial dimension of communication practices.

## (ii) *The legal idea comes full circle*

<sup>63</sup> R Atherton, ‘New Zealand’s Testator’s Family Maintenance Act of 1900 – The Stouts, The Women’s Movement and Political Compromise’ (1990) 7 Otago Law Review 202.

<sup>64</sup> Who came from the Shetlands where he went to school and qualified as a teacher before emigrating in 1963 to New Zealand at the age of 19.

<sup>65</sup> Limitation of the Power of Disposition by Will Bill 1896.

<sup>66</sup> Limitation of the Power of Disposition by Will Bill 1897.

<sup>67</sup> Atherton (n 63) 211.

<sup>68</sup> The 1896 Bill gave one third of all property to the widow, and one third to the child or children. The 1897 Bill reduced their shares to one quarter. In an earlier speech cited by Atherton (n 63) 207 Stout had mentioned both Scotland and France, but at the time France did not provide the surviving spouse with a fixed share. That is a recent change.

<sup>69</sup> Ibid, 216.

<sup>70</sup> Ibid, 213.

<sup>71</sup> Another, example of where Scottish legal ideas have circulated via another jurisdiction is mentioned by J Blackie, ‘Old and Foreign: History, Historiography and Comparative Law’ in L Farmer and S Veitch (eds), *The State of Scots Law: Law and Government after the Devolution Settlement* (Butterworths 2001) 75, 91 who examines the Scottish case *Main v Leask* 1910 SC 772 dealing with the duty of care in negligence in ‘pure economic loss’. After a PhD student at the University of London had given it prominence first in his PhD and then in an article (C Harvey, ‘Economic Losses and Negligence: The Search for Just Solution’ (1972) 50 Canadian Bar Review 58.) A resurrection followed in Australia where the High Court used this Canadian article and from there ‘it got back alive to the United Kingdom’, first in Scotland and then south of the border.

<sup>72</sup> Reid, ‘Legal Rights in Scotland’ (n 52) 5.

By paying attention to both time and space it is also sometimes possible to see that legal ideas circulate south and then come back up north again, or the other way around, as we have just seen with the example drawn from succession law. In other words, sometimes legal ideas can take a circular movement (i.e., come back full circle). An interesting example, which I can only deal with very briefly, is the doctrine of diminished responsibility. Although the exact origins of the doctrine in Scots law seem to be unclear, there is no doubt that the doctrine first circulated from Scotland to England when section 2 of the Homicide Act 1957 was passed.<sup>73</sup> The fact that English law has introduced a version of the Scottish doctrine of diminished responsibility, is commonly acknowledged by legal scholars and judges, both north and south of the border.<sup>74</sup> What is perhaps less well known, however, and what renders this example so fascinating, is that 45 years after the introduction of the Homicide Act 1957, in *Galbraith v HM Advocate (No 2)*,<sup>75</sup> the High Court of Justiciary directly drew on s 2 of the Homicide Act 1957. In other words, aspects of the English legislation which was originally inspired by Scots law were now used by the court in interpreting and developing Scots law.

As James Chalmers has pointed out, ‘in a remarkable process of circularity, [the court] has imported the English definition [of abnormality of mind] into Scots law’,<sup>76</sup> drawing directly on s 2 of the (English) Homicide Act 1957. Again, greater awareness of the spatial dimension of the process can make us see here aspects that we would otherwise miss. What is more, as Chalmers laments, the High Court of Justiciary does not acknowledge explicitly that it has taken the definition from south of the border.<sup>77</sup> In other words, the doctrine of diminished responsibility is an example not just of the circular movement of some legal ideas, but also of both open and hidden circulations, alerting us to the importance of paying attention to the language employed by legal actors, which represents the focus of the next part of this article.

### 3. *Paying Attention to Language*

Besides considering the spatio-temporal dimensions of communication practices, we should also pay attention to language and the labels employed in communication practices, by on the one hand, observing what is explicitly said, and, on the other hand, looking beyond what is immediately visible or displayed, and thus noticing what is absent.

In this article, we have already come across several instances, where the Scottish origins of legal ideas were openly declared or acknowledged.<sup>78</sup> It is important to pay attention to such instances and to inquire what lies behind such open manifestations and acknowledgments, as this can sometimes provide insight into the motivations that underpin existing communication practices, in our case between the Scottish and English legal traditions. At the same time, looking beyond the language employed is also crucial. This is so for a number of reasons. For instance, explicit claims that the law is the same on both sides of the border can conceal attempts to assimilate the law, whether in one direction or the other. Second, the absence of

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<sup>73</sup> HC Debs 27 Nov 1956, col 318 (statement of the Attorney-General): ‘introduce into English law the Scottish doctrine of diminished responsibility’. See also HC Debs 15 Nov 1956, col 1153 (statement of the Home Secretary).

<sup>74</sup> It is acknowledged in *Smith and Hogan’s Criminal Law* (OUP 2015) 604, Fn 201. See also *R v Spriggs* [1958] 1 QB 270, 274, per Lord Goddard CJ and more recently *Regina v Smith* [2001] 1 AC 146 (HL), 175 per Lord Clyde, and *Lee Robert Foye v The Queen* [2013] EWCA Crim 474, [16], [31].

<sup>75</sup> *Galbraith v HM Advocate (No 2)* 2001 SLT 953.

<sup>76</sup> J Chalmers, ‘Abnormality and Anglicisation: First Thoughts on *Galbraith v HM Advocate*’ (2002) 6 *Edinburgh Law Review* 108, 114.

<sup>77</sup> *Ibid*, Fn 37.

<sup>78</sup> See above the example of the declaratory actions or *forum non conveniens*.

acknowledgement or referencing of the Scottish provenance is not necessarily indicative of a lack of communication. On the contrary, it may be a way of disguising the appropriation of Scottish legal ideas or suggest that they have been naturalised. Thus, paying attention to language and looking beyond it can reveal a range of techniques and practices employed by legal actors. These techniques can sometimes be expressions of political or ideological objectives,<sup>79</sup> or simply be explained by considerations of mere convenience.

In other words, even though circulation can happen in non-deliberate ways, what I am trying to argue here is that language can be indicative of practices that facilitate circulation, and that can be employed deliberately and instrumentally. In this section I will take a closer look at some of these techniques, as used by judges. In doing so I will explore both instances where the Scottish provenance of the legal ideas are openly discussed, and instances where they are either not immediately visible or perhaps purposefully hidden.

#### *A. Claiming That the Law Is the Same on Both Sides of the Border*

Sometimes courts tell us that the law is the same on both sides of the border. Now, this may well be true and there are many areas in which English and Scots law are essentially the same. For instance, a number of aspects of the English law of negligence have been derived from Scots law and vice versa.<sup>80</sup> However, simply because courts say that the law is the same on both sides of the border, does not mean that this is the case. It is well known that especially in the past, claims that the law is the same has been a technique or practice commonly employed by the House of Lords to align Scots law with English law.<sup>81</sup> However, it is argued here that the exact same technique or practice is also sometimes used to assimilate English law with Scots law. One can indeed find statements along the lines that English law is or should be the same as Scots law.<sup>82</sup>

Pragmatic justifications aside,<sup>83</sup> in the past, and more specifically between the second half of the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> century, attempts to assimilate the law on both sides

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<sup>79</sup> Rodger, 'Thinking about Scots Law' (n 5). On the role of ideology in the context of legal transplants, see especially M Graziadei, 'Legal Transplants and the Frontier of Legal Knowledge' (2009) 10 *Theoretical Inquiries in Law* (2009) 723, 738.

<sup>80</sup> Lord Hope, 'Scots law seen from south of the border' (2012) *Edinburgh Law Review* 58, 66. See *Home Office v Dorset Yacht* [1970] AC 1004 (HL), where Lord Reid stated that 'because the Scots and English laws of negligence are the same'. In *Mitchell v Glasgow* [2009] UKHL 11 [80] Lord Brown of Eaton-Under-Heywood said '[M]uch of England's negligence law was forged in Scottish appeals'. And at [78] Lady Hale mentioned that 'This is but the latest in a long line of cases from Scotland which have played such an important part in shaping the law of negligence for the whole of the United Kingdom.' As to the role of *Donoghue v Stevenson*, see HL MacQueen and WDH Sellar, 'Negligence' in KGC Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (OUP 2000) vol 2, 517. Vicarious liability seems to be another area of continuous mutual interactions between England and Scotland and this is openly recognised in *Lister and Others v Hesley Hall Ltd* [2002] 1 AC 215 (HL) [39] where Lord Clyde acknowledged that: 'This area of the law is one where Scotland and England have each drawn on the other's jurisprudence.' See also *Wilsons v Clyde Coal Co Ltd v English* [1938] AC 57 (HL), 85 per Lord Maugham: 'I am induced to do so only because the law in England on this topic is, in my opinion, the same as that in Scotland, and the case is one of great general importance.'

<sup>81</sup> The technique is referred to by Gibb, *Law From Over the Border* (n 8); Brodie (n 8) 287, and DM Walker, 'Some Characteristics of Scots Law' (1955) 18 *Modern Law Review* 321, 333 who speaks of a 'trick'. See further Hope (n 80) 142. A good example in the context of occupier's liability is the House of Lords decision on a Scottish appeal in *Robert Addie and Sons (Collieries), Limited Appellants; v Dumbreck Respondent* [1929] AC 35 where Scots law is brought in line with English law. As Elspeth Reid has put it in 'The Impact of Institutions and Professions in Scotland' in P Mitchell (ed) *Comparative Studies in the Development of the Law of Torts in Europe* (CUP 2012) 59, 65 'the speeches of the two Scots on the Committee, Lords Dunedin and Shaw, were central in assuring their brethren in the House of Lords that English and Scots law were already at one in this area. They were not.'

<sup>82</sup> A famous example is *Donoghue v Stevenson* [1932] AC 562 (HL).

<sup>83</sup> Rodger, 'Thinking about Scots Law' (n 5) 18.

of the border, and in particular to align Scots with English law, were sometimes motivated by ambitious political reasons, more specifically the desire to create a ‘law of the Empire’ or ‘one law for Britain’.<sup>84</sup> This explanation, of course, does not explain more contemporary instances of assimilation, though Lady Hale’s recent lecture to the Scottish Law Society on the ‘Contribution of Scottish Cases to the Developing United Kingdom Law’ could suggest that there is perhaps a sense among members of the Supreme Court that a ‘law of the UK’ is developing that is built not just by legislative interventions but also case law.<sup>85</sup> This brings me to the next point.

In some instances, uniformity on both sides of the border, and thus consistent interpretation, is desirable and hence declared or assumed because the area is one in which there is UK legislation in place.<sup>86</sup> There are plenty of such examples, e.g. in areas such as employment law, company law, tax law but also immigration law and social security law.<sup>87</sup> But even outside the areas characterised by UK legislation, uniformity can be desirable.<sup>88</sup> Here I would like to draw attention to the recent Supreme Court decision in *Woolway (Valuation Officer) v Mazars*.<sup>89</sup> The case deals with the valuation for non-domestic rates, that is tax on individual units of property, known in England as hereditaments. Where a hereditament is wholly or partly occupied, rates are payable by the party who is in rateable occupation. In *Woolway* it was necessary to decide whether distinct spaces were under common occupation.

Without being able to enter into too much detail, what is vital is that the Supreme Court expressly derived the principles which decided the case directly from Scottish case law, and that it used them to overturn the leading English Court of Appeal decision in *Gilbert v Hickingbottom & Sons Ltd* decided back in 1956.<sup>90</sup> Even more important for the purposes of the argument developed in this section is that Lord Sumption, who gave the leading judgment in *Woolway*, having outlined the principles which he derived from Scottish case law, argued that:

<sup>84</sup> Ibid, 20-21; Evans-Jones, ‘Roman law in Scotland’ (n 12) 614 ff. See also E Reid ‘The Impact of Institutions’ (n 81) 68-9 and E Reid, ‘Smith v Littlewoods Organisation Ltd (1985)’, in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Tort* (Hart Publishing 2010) 251.

<sup>85</sup> Lady Hale, ‘The Contribution of Scottish Cases’ (n 9), who put it in the following terms: ‘We are also very conscious, in the Supreme Court of the United Kingdom, of the contribution made by Scottish cases, and also by Scottish lawyers, to the development of United Kingdom law’. See *Majrowski v Guy’s and St Thomas’s NHS Trust* [2005] EWCA Civ 251, [21] where Auld LJ built upon Counsel for the plaintiff’s use of Scottish academic literature and Scots case law and agreed that the only ‘United Kingdom authority for the proposition that an employer may be vicariously liable for breach of statutory duty’ was the Scottish Court of Session case *Nicol v National Coal Board* (1952) 102 LJ 357.

<sup>86</sup> A good example here is the HL decision in *Berkeley v Berkeley* [1946] AC 555 (HL) dealing with the question of the meaning of the term ‘provision’ in the Finance Act 1941 s 25, sub-s. I, which applies to the whole of the UK. References to similar presumptions can be found also in *Winter v IRC (Appeal in In re Sutherland, Decd)* [1963] AC 235 (HL) dealing with the meaning of ‘contingent liability’. Again, the interpretation given in Scots law was applied to an English appeal. The case played a central role in the decision of the Supreme Court in *Re Nortel GmbH or Bloom v Pensions Regulator (In re Sutherland, decd)* [2014] AC 209, [81] concerning the pension context.

<sup>87</sup> See Lady Hale’s lecture ‘What is the United Kingdom Supreme Court for?’, Macfadyen Lecture 2019, Edinburgh, 28 March 2019, 12.

<sup>88</sup> See Viscount Finlay in *Cantiere San Rocco SA v Clyde Shipbuilding and Engineering Co Ltd* [1924] AC 226 (HL) 244 who observed: ‘It would be unfortunate that in matters of this kind, which may, as here, affect foreigners, the results should be different in the two parts of Great Britain.’

<sup>89</sup> *Woolway (Valuation Officer) v Mazars LLP* [2015] UKSC 53.

<sup>90</sup> *Gilbert v Hickingbottom & Sons Ltd* [1956] 2 QB 40 (CA). What is fascinating here is that although Lord Denning had preferred the geographical test, he felt bound to dismiss the appeal because in his view the application of the test was a question of fact. He argued that if the Lands Tribunal thought that it was one hereditament, they must have had their reasons. While Lord Sumption was ‘surprised’ by this conclusion [14] Lord Neuberger [58] described Denning’s choice ‘as an abdication of an appellate judge’s responsibility.’ Thus, here we have another example of a delayed adoption.

One would not expect the law to be any different when the identical questions arise for decision in England. However, confusion has been caused by the leading English case, which is the decision of the Court of Appeal in *Gilbert v S Hickinbottom & Sons Ltd* [1956] 2 QB 40.<sup>91</sup>

Here Lord Sumption (with whom Lord Carnwath and Lord Toulson agreed) clearly wanted to bring English law in line with Scots law. However, Lord Sumption did not explain why one would not expect the law to be different, which is significant because this is not an instance where there is UK legislation in place. However, the other members of the court felt just the same. Lord Gill, formerly Lord President of the Court of Session who was sitting as a temporary judge (who has a wealth of experience in this area of the law and who may well have played a role behind the scenes), put things in a slightly different manner. In his view:

Although the law of valuation for rating is governed in Scotland by different legislation, the essential point is identical in both jurisdictions. ...in my view, there is no reason why the two jurisdictions should diverge on the principles of the matter. On the contrary, it is desirable that they should coincide.<sup>92</sup>

To say that there is no reason why the law should diverge is of course somewhat different from saying that one would not expect it to be different, for it suggests that it could be different, though Lord Gill clearly found that undesirable. By contrast, using normative language, Lord Neuberger put it in yet another way:

I entirely agree that there *should* be no difference of approach between Scottish and English law on the issue raised on this appeal.<sup>93</sup> (emphasis added)

Irrespective of these differences in language, in *Woolway* the Supreme Court agreed that uniformity of approach north and south of the border was desirable and that Scots law offered a better approach. As a result, the law in England was aligned with the geographical test prevailing in Scotland. This was done by means of a practice that, as noted earlier, has often been used to align Scots with English law. Attention to language therefore provides useful insights into how communication takes place, but also the underlying motivations.

Notice also that in this case, there was no attempt by members of the Supreme Court to hide or disguise that the law on both sides of the border had been different or that the new geographical test had Scottish origins. But this is not always the case. Sometimes, the circulation takes place in disguise, and this can be done purposefully. In fact, where judges state that the law 'is' the same, but this is not the case, the changes they are aiming to bring about may not be immediately obvious, and the circulation therefore be masked. Thus, looking beyond the language is also vital.

### *B. Failing to Acknowledge Scottish Origins*

As mentioned earlier, the fact that there is no explicit reference to Scots law does not mean that there is no communication or circulation of Scottish legal ideas. Indeed, there are cases where Scottish legal ideas have circulated south of the border but where their origins have simply not been mentioned explicitly. A striking example of an instance where the Scottish provenance was not revealed (at first) is the area of penalty clauses, though as we will see in due course,

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<sup>91</sup> *Woolway (Valuation Officer) v Mazars LLP* (n 89) [13].

<sup>92</sup> *Ibid*, [34].

<sup>93</sup> *Ibid*, [46].



the influence has recently been acknowledged, and in a prominent manner, both by the Court of Appeal and the Supreme Court.

Here the foundations for the later adoption of Scottish legal ideas were laid by the 1905 House of Lords decision in a Scottish appeal in *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Catandeda*.<sup>94</sup> Perhaps unexpectedly, it was the judgment of one of the English judges, Lord Halsbury LC, which was to play a crucial role in facilitating the circulation of Scottish legal ideas. After having approved the position of Scots law on penalty clauses, and affirmed the decision of the Inner House of the Court of Session, Lord Halsbury LC claimed that '[i]t is, I think, not denied now that the law is the same both in England and in Scotland'.<sup>95</sup> Thus, here we have another example of the technique referred to above whereby the law on both sides of the border is declared to be the same. Whether Lord Halsbury LC's claim was true is doubtful. David Ibbetson has shown not only that Scots law was different at least since 1869, but also that the conclusion that Lord Halsbury LC had reached was not one that for instance 'the editors of the standard Common-law texts on contract at the time thought to incorporate into their works.'<sup>96</sup>

It is difficult to know what motivated Lord Halsbury LC's observation, especially since *Clydebank Engineering* was a Scottish appeal case and it was not necessary to reach a position on English law. The fact that his Lordship specified 'now', is most likely to be explained by the fact that in an earlier Scottish appeal to the House of Lords, decided in 1886, *Lord Elphinstone v Monkland Iron and Coal Co*,<sup>97</sup> and in which his Lordship had also been part of the panel, Lord Fitzgerald had noted that:

the law of Scotland, which we are now administering, seems in this respect to agree in principle with the law of the rest of the United Kingdom; or it would be more correct to say that the law of Scotland in this respect existed in full force and equitable effect whilst we were struggling against the hard and technical rules of our common law. I am not aware that there is any enactment in force in Scotland corresponding to our statute of 8 & 9 Wm. 3, c. 11, s. 8; nor does the Scotch law seem to have required such aid. We may take it, then, that by the law of Scotland the parties to any contract may fix the damages to result from a breach at a sum estimated as liquidated damages, or they may enforce the performance of the stipulations of the agreement by a penalty.<sup>98</sup>

Again, why his Lordship felt the need to mention the fact that Scots law was in principle in agreement with the law in the rest of the UK, given that it was a Scottish appeal, is unclear. Be that as it may, while for Lord Fitzgerald in *Lord Elphinstone*, Scots law agreed *in principle* with the law in the rest of the UK, for Lord Halsbury LC in *Clydebank Engineering* it could not *now* be doubted that the law was *the same*. Hence, Lord Halsbury went a step further. Indeed, in his view the only difference between English and Scots law was the mode of administration of equity and law which was distinct in England. Whatever the motives behind his assertion, Lord Halsbury LC's words seems to have prepared the ground for what was to happen ten years later in the English case *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd*.<sup>99</sup>

In *Dunlop* counsel for the appellants cited both Scottish appeal cases, *Clydebank* and *Lord Elphinstone*. Importantly, both cases had been reported in the law report series of the Appeal

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<sup>94</sup> *Clydebank Engineering & Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Catandeda* [1905] AC 6; (1904) 7 F (HL) 77.

<sup>95</sup> *Ibid*, 9-10.

<sup>96</sup> Ibbetson (n 13) 279.

<sup>97</sup> *Lord Elphinstone v Monkland Iron and Coal Co* (1886) 11 App Cas 332.

<sup>98</sup> *Ibid*, 108.

<sup>99</sup> *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 (HL).

Cases and were thus known and available to members of the English legal profession, which is a point I will return to in the conclusion. Lord Dunedin, whom we came across earlier in the context of declaratory orders, and who gave the leading judgment in *Dunlop*, relied primarily on three decisions: *Clydebank*, as well as two Privy Council decisions that had followed *Clydebank* within a short period of time: *Webster v Bosanquet*,<sup>100</sup> an appeal from Ceylon, and *Public Works Commissioner v Hills*,<sup>101</sup> an appeal from the Cape of Good Hope, in which Lord Dunedin was himself involved in. From these three cases Lord Dunedin drew propositions and developed a set of tests which became ‘the classic statement of the law of penalties’,<sup>102</sup> and which would be influential in a wide range of cases in England and beyond.<sup>103</sup> Thus, just as his Lordship did in *Russian Commercial*,<sup>104</sup> dealing with declaratory orders, in *Dunlop*, Lord Dunedin formulated a set of tests drawn from case law, in this case on penalty clauses. Whether or not Lord Dunedin’s choice to distil propositions was deliberate – and it is likely that it was, for that was his style – one cannot but wonder whether this was a key reason why the Scottish legal ideas found their way into English law. Form matters and is perhaps not always paid sufficient attention to in comparative legal studies.

What is noteworthy for the purposes of this section of the article is that Lord Dunedin did *not* mention that *Clydebank* was a Scottish appeal case, and neither did the other three judges.<sup>105</sup> Indeed, nobody questioned whether *Clydebank* should be used as authority for English law. Thus, although there is no express acknowledgement in *Dunlop* that both *Clydebank* and *Lord Elphinstone* were Scottish cases, Scottish legal ideas quietly circulated south of the border and were accepted as English law. Even so, *Dunlop* was clearly crucial in rendering the rules part of English law.

But why did Lord Dunedin, or indeed any of the other judges, not point out that *Clydebank* and *Elphinstone* were Scottish appeal cases decided on the basis of Scots law? One might argue that their Lordships may have acted on the assumption that the law was the same in both jurisdictions. After all, that is what Lord Halsbury LC had stated in *Clydebank*. Also, none of the members of the panel in *Dunlop* had pointed out that the two Privy Council decisions came from Ceylon or the Cape of Good Hope. This may be explained by the fact that these were the heydays of the Empire so that the judges may not have felt the need to point out the provenance of the cases. Yet, this did not stop judges from mentioning the Scottish origins in other contemporary cases.<sup>106</sup> What is more, one cannot help but notice that in the PC decision in *Commissioner of Public Works v Hills*, also referred to in *Dunlop*, and in which Lord Dunedin had delivered the Privy Council’s advice, his Lordship had explicitly stressed that *Clydebank* was indeed a Scottish and not an English case.<sup>107</sup>

The House of Lords had occasion to review the law in the matter in the recent case of *Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda*. It is perhaps worthy of remark, in view of certain observations of the learned Chief Justice in the Court below, that that was a Scotch case, that is to say, decided according to the rules of a system of law where

<sup>100</sup> *Webster v Bosanquet* [1912] AC 394 (PC).

<sup>101</sup> *Commissioner of Public Works v Hills* [1906] AC 368 (PC).

<sup>102</sup> These are the words of Arden LJ in *Murray v Leisureplay Plc* [2005] EWCA Civ 963, [34].

<sup>103</sup> On Lord Dunedin’s influence in Australia, see J Eldrige, ‘The new law of penalties: mapping the terrain’ (2018) *Journal of Business Law* 637.

<sup>104</sup> Text after Fn 37.

<sup>105</sup> Lord Atkinson, Lord Parker of Waddington and Lord Parmoor.

<sup>106</sup> See, for instance, *Cantiere San Rocco SA v Clyde Shipbuilding and Engineering Co Ltd* (n 88).

<sup>107</sup> *Commissioner of Public Works v Hills* (n 101) 375. Here note that P Mitchell, ‘The Privy Council and the Difficulty of Distance’ (2016) 36 *Oxford Journal of Legal Studies* 26, 30 has argued that in the Privy Council, judges ‘often went out of their way to signal that they were not rigidly applying English standards to the cases they heard’.

contract law is based directly on the civil law and where no complications in the matter of pleading had ever been introduced by the separation of common law and equity.

So, it is not as if Lord Dunedin was unaware of the fact that *Clydebank* was a Scottish case or that Scots and English law differed on this point. However, the reference in *Commissioner of Public Works* to the Scottish origins is perhaps explained by the fact that Lord Dunedin was evidently responding to remarks by De Villiers CJ in the Court below, who had stressed that English law was not consistent with Roman-Dutch law.<sup>108</sup> In other words, given that the decisions came from the Cape of Good Hope, Lord Dunedin may have felt the need to point out the Scottish origins of the appeal. David Ibbetson describes it therefore as ‘an example, perhaps, of mixed legal systems clubbing together’.<sup>109</sup>

Irrespective of whether or not Lord Dunedin’s silence was strategic,<sup>110</sup> the lack of mention of the Scottish origins was arguably a wise choice, for it is likely to have paved the way for Scots law to circulate south of the border. The omission of any reference to the provenance of the source of law may well have forestalled negative or adverse rejections.<sup>111</sup> In this case, it may have allowed for *Dunlop* to be more easily accepted as authority for English law.<sup>112</sup> As Lord Rodger has shown, in *Donoghue v Stevenson*, Lord Atkin had ‘prevailed upon Lord Macmillan to rewrite his speech in a way which would apply to English law also.’<sup>113</sup>

However, the story did not end here. In fact, 90 years later, in 2005, in the Court of Appeal decision in *Murray v Leisureplay Plc*,<sup>114</sup> Arden LJ unexpectedly, and one could even argue emphatically, credits *Dunlop* (as well as the two Scottish appeal cases, *Clydebank* and *Lord Elphinstone*) with having exerted a formative influence on the English law of penalty clauses. These were Arden LJ’s words:

Interestingly, despite the influence of equity, English law has not always taken a consistent approach. As cases cited by the parties show, that the present position was only reached through the influence of Scots law and Commonwealth jurisprudence. *Dunlop Pneumatic Tyre v New Garage and Motor Company, Ltd* is thus a remarkable example of the ability of English common law to absorb rules from other legal systems and in addition the influence of the Privy Council.<sup>115</sup>

In her Ladyships opinion, Lord Dunedin’s speech in *Dunlop* ‘enunciated the law on penalties which is now embedded in our Common law’.<sup>116</sup> Thus, we have here an instance where the influence of both, the Scottish appeal decision in *Clydebank* and the judgment of Lord Dunedin in the English appeal case *Dunlop* (as well as the two PC decisions), is explicitly acknowledged, though not at the time when Scots law had first entered the English legal system. This shows once more that attention to the temporal dimension is critical. The interesting question is of course, why did Arden LJ feel the need to point out the role and influence of Scots law? We can only speculate. What is noticeable is that Arden LJ was not

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<sup>108</sup> *Hills v Colonial Government* (1904) 21 SCR 59, 79.

<sup>109</sup> Ibbetson (n 13) 280.

<sup>110</sup> Notice that *Dunlop* is not the only case not mentioning the Scottish pedigree. *Clydebank* is followed in *Webster v Bosanquet* (n 100) on appeal from Ceylon, and again its ‘Scottishness’ is not mentioned.

<sup>111</sup> Graziadei (n 1) 463.

<sup>112</sup> Evans-Jones, ‘Roman law in Scotland’ (n 12) 607 has argued that sometimes the ‘loan’ from Scotland had to be suppressed to overcome certain obstacles. Later at page 629 he suggests that in *Woolwich Building Society v IRC* [1993] AC 70 Lord Goff ‘was possibly unwise to identify the source of his inspiration [civilian and Scots law] so clearly. It caused a vigorous reaction amongst English academics, who successfully argued that such a cause of action drawn from the civil law would be highly damaging if introduced into the common law.’

<sup>113</sup> A Rodger, ‘Lord Macmillan’s speech in *Donoghue v Stevenson*’ (1992) 108 Law Quarterly Review 236, 247.

<sup>114</sup> *Murray v Leisureplay Plc* (n 102) 963.

<sup>115</sup> *Ibid*, [30].

<sup>116</sup> *Ibid*, [31]- [34].

only making a point about the relevance of Scots law, and of the two Privy Council decisions, but importantly also one about English law, and in particular about its capability to absorb rules from other legal systems.

Another ten years later, the influence of Scots law in the area of penalty clauses was explicitly acknowledged also by the Supreme Court, in *Cavendish Square Holdings BV v Makdessi; Parking Eye Ltd v Beavis*,<sup>117</sup> and this time by several members of the Court.<sup>118</sup> This is not the place to engage in an analysis of the Supreme Court decision in *Makdessi*, and its consequences for the area of penalty clauses, including in Scotland. But it is curious that, Lord Neuberger and Lord Sumption stated that ‘Lord Dunedin’s speech in the *Dunlop* case achieved the status of a quasi-statutory code in the subsequent case law,’ and that regrettably distinctions had developed which ‘originate in an over-literal reading of Lord Dunedin’s four tests and a tendency to treat them as almost immutable rules of general application which exhaust the field.’<sup>119</sup> Thus, although arguably Lord Dunedin’s laying out of a set of propositions and tests may have, on the one hand, allowed the Scottish legal ideas to circulate more easily, in Lord Neuberger’s and Lord Sumption’s view the interpretation of Lord Dunedin’s speech had ultimately stifled the development of the common law. On an aside, in his judgment in *Makdessi*, Lord Hodge, undertook a historical survey of the Scottish rule, suggesting that there have been mutual influences as ‘Scots law has used English authorities, in its development.’<sup>120</sup> This would suggest that the circulation in this area of the law has not just been one way. Again, the plot is thickening, showing that the relationship is both reciprocal and complex, even if this is not always visible at first sight.

Hence, the area of penalty clauses offers a salient example of how communication between Scotland and England can take place both openly and under the radar, but also of how stories of circulations and influences are sometimes told or not, and why. It also demonstrates that judges can resort to a range of techniques and confirms once more the importance of studying communication practices over time.

#### 4. Conclusion

In this article I have tried to show that the relationship between Scotland and England is much richer and more dynamic than often conveyed by both Scottish and comparative legal literature. I have argued that this comes clearer into view if we study the relationship through the lens of communication practices, including how they unfold both across time and space, and pay careful attention to language. The article is therefore an invitation to extend comparative legal inquiry beyond discrete events and geographical spaces, and to study communication practices and the processes involved. This, then, allows us to garner a much more nuanced understanding of the relationships between legal traditions.

The examples covered have shown that communication between north and south of the border is ongoing and has taken place across different areas of the law, ranging from criminal law to succession law, from contract law to tax law, and beyond. Quite often, communication stretches over long periods of time, as the circulation involves various steps and events that are frequently interconnected, before an idea may take a foothold. This process can be more or less visible, which is a common theme throughout this paper. What has also emerged is that communication may take place both directly and indirectly, and be initiated by different legal

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<sup>117</sup> *Cavendish Square Holdings BV v Makdessi; Parking Eye Ltd v Beavis* [2015] UKSC 67, [2016] AC 1172.

<sup>118</sup> *Ibid*, [37] (Lord Neuberger) and (Lord Sumption), and [131] (Lord Mance).

<sup>119</sup> *Ibid*, [31].

<sup>120</sup> *Ibid*, [216], referring to Bell’s *Principles of the Law of Scotland* (10<sup>th</sup> edn, 1899) section 34 who refers to English cases.

actors, on both sides of the border, who sometimes avail themselves not only of channels but also techniques that can facilitate the circulation of legal ideas in both directions. In many of the examples in this article, the circulation is purposefully initiated, for instance where a seed is planted, or the law is claimed to be the same on both sides of the border, or the Scottish roots of the legal idea is disguised. This, as we have seen, may be driven by a number of motives, including dissatisfaction with the state of the law,<sup>121</sup> but also political and ideological reasons, as well as considerations of mere convenience or pragmatism.<sup>122</sup>

All this has, of course, implications for how we perceive both English and Scots law. On the one hand, the analysis shows that English law is permeable to ideas from Scotland,<sup>123</sup> including Civil law ideas,<sup>124</sup> and perhaps more than often assumed and acknowledged. Moreover, although the penalty clauses example shows that English courts have been equally open to influences from other parts of the former British Empire, the relationship with Scotland is clearly different and distinctive. Aside from proximity, economic and political affinity, and the institutional factors referred to above,<sup>125</sup> there are many areas where the law is effectively the same or where assimilation is desirable due, for instance, to the existence of UK legislation. Another significant factor would seem to be the availability and accessibility of source material. It must be remembered that appeal cases from Scotland are often reported in the law report series of the Appeal Cases. Whilst the publication of the official English law reports ‘made possession of those reports easy to those who lived in Scotland’,<sup>126</sup> and therefore allowed for English legal ideas to circulate north of the border, the same reports have made the Scottish appeal cases available to the English legal profession. It is noticeable in this regard that south of the Tweed, the Scottish appeals to the House of Lords, or now to the Supreme Court, are usually referred to by citing the English and not the Scottish reports. This may contribute to explaining why the Scottish origins of some of these decisions, especially those that have become leading cases in their own spheres, are sometimes no longer mentioned.<sup>127</sup> Thus, there are particular reasons why English legal actors draw on legal ideas from Scotland rather than from other jurisdictions. In fact, a further aspect that has emerged is that when Scots law is used to promote change in the law in England, it is not usually regarded as ‘foreign’, even when, as was the case in the penalty clauses example, the ‘Scottishness’ of the tests was explicitly referred to.<sup>128</sup>

<sup>121</sup> See also Evans-Jones, ‘Roman law in Scotland’ (n 12) 629.

<sup>122</sup> An example of such pragmatism may be *Gow v Grant* [2012] UKSC 29, [44]-[56] where in a long *obiter dictum* Lady Hale points out five lessons that can be learned from the Scottish experience.

<sup>123</sup> The receptiveness to legal ideas from ‘other legal systems’ has been, however, acknowledged by members of the judiciary. See the words by Arden LJ in *Murray* [30] cited above at n 115. See also Lord Bingham, ‘The Future of the Common Law’, in T Bingham (ed), *The Business of Judging: Selected Essays and Speeches* (OUP 2000) 383 ‘the common law has over the centuries provided a shameless snapper-up of well-considered trifles of foreign law.’

<sup>124</sup> We have indeed seen that some of the ideas coming from north of the border, are civilian in origin e.g. declaratory actions. See also Evans-Jones, ‘Roman law in Scotland’ (n 12) 629 and, especially, Lord Rodger, ‘“Say Not the Struggle Naught Availeth”: The Costs and Benefits of Mixed Legal Systems’ (2003) 78 *Tulane Law Review* 419, 430 where he remarked that ‘I suspect that the reality is that common law systems are now more permeable to civil law influences than civil law systems are to influences from the common law.... That may mean that the gap between mixed systems and common law systems will narrow over the coming decades.’

<sup>125</sup> See above at Fn 10 and 11.

<sup>126</sup> Lord Dunedin, ‘Preface’, in JL Wark (ed), *Encyclopaedia of the Laws of Scotland*, Vol 1 (W Green & Son 1926) vi.

<sup>127</sup> A very good example is, again, *Donoghue v Stevenson* (n 82), which has been referred to as ‘the most famous case in English law of tort’, by N McBride and R Bagshaw, *Tort Law* (3<sup>rd</sup> edn, Longman 2008) 72. *Junior Books v Veitchi* [1983] 1 AC 520 is also often discussed in the context of English tort cases on economic loss and without reference to its Scottish origins.

<sup>128</sup> See above text at Fnn 42 and 47.

At the same time, and equally importantly, the examples also tell us something about Scots law. The image that emerges here is not one of a legal system that is merely receptive of foreign legal ideas, as the prevailing narrative would have us believe, but that of a legal system which also generates ideas capable of stimulating and shaping developments elsewhere, i.e. a place through and from which legal ideas circulate in all sorts of directions, sometimes to come full circle again. This finding, I believe, warrants further reflection and attention. Although the concept of ‘mixed legal systems’ has ignited assumptions that have made us perhaps blind to certain aspects of them,<sup>129</sup> and their relationships with other legal traditions, this article shows that they have the ability to enter into a dialogue with other legal traditions in ways that can facilitate circulation in both directions.

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<sup>129</sup> Lord Rodger, ‘Say Not the Struggle’ (n 123) 422 argued that ‘those who place importance on its mixed nature tend to define our legal system by its past!’.